SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 241

ALLISON BISHOPRIC, MARK TWAIN OIL CO., W. B. SHAFFER, AND NATIONAL SURETY CORPORATION,

Petitioners,

vs.

CITY OF JACKSON, MISSISSIPPI, AND MISSISSIPPI POWER & LIGHT COMPANY,

Respondents.

BRIEF OF THE CITY OF JACKSON IN RESPONSE TO PETITION FOR CERTIORARI.

W. E. MORSE,
Atty. for the City of Jackson.

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 241

ALLISON BISHOPRIC, MARK TWAIN OIL CO., W. B. SHAFFER, AND NATIONAL SURETY CORPORATION,

Petitioners,

vs.

CITY OF JACKSON, MISSISSIPPI, AND MISSISSIPPI POWER & LIGHT COMPANY,

Respondents.

BRIEF OF THE CITY OF JACKSON IN RESPONSE TO PETITION FOR CERTIORARI.

A restatement of the facts in the case should be made for clarification before responding to the petition or brief. The Record presents three cases consolidated by order of the Lower Court:—Suit No. 28,901, styled "J. L. Harper vs. Allison Bishopric, City of Jackson, et al.; Suit No. 29,050, styled, "City of Jackson vs. Mississippi Power & Light Company, et al.", (Page 1, Record); and Suit No. 29,532, styled, "Mrs. Louise Cross Simpson vs. City of Jackson", (Page 73 of Record, Pages 193-194 Record).

Suit No. 28,901 was filed in March, 1941. There was an answer and cross-bill of the City of Jackson to this suit, embracing petitioners Bishopric, Shaffer and Harper. This answer and cross-bill is shown on Pages 40-49 inclusive of Record. The answer and cross-bill of the City set up that the dealings between the City, Bishopric, Shaffer and Harper were ultra vires, null and void, and beyond the scope and power of the City and the prayer was that the contract and assignments which were made a part of the cross-bill be decreed to be null and void on account of having been beyond the scope of the City so to make, and subject only to the rights of the petitioners to recover for the money actually expended by them plus interest. Bishopric, et al., filed an answer in Proceedings No. 28,901, shown on Pages 57-64 inclusive of Record. They also filed a cross-bill in Proceeding No. 28,901, praying for reformation of the assignments, specific performance of their contract, and petitioned that the City be required to execute leases on other lands to them. They also prayed in Prayer #3 that after the City had repaid itself for the money it had advanced (or loaned) Allison Bishopric, et al., that they be awarded judgment; and prayed for damages in the sum of $50,000.00, being for the sale of gas claimed by them in their cross-bill to have a value of 30¢ per mcf.

One of the wells was located on property not embraced in the lease, and to adjust the equities between the parties, the Suit No. 29,050 was filed. Pages 1 to 36, inclusive of Record. This original bill brought in many new parties, as under Miss. Decisions, *Ladner* v. *Ogden*, 31 Miss. 332, *Bishop* v. *Miller*, 48 Miss. 364, *Wright* v. *Frank*, 61 Miss. 32, persons not parties to the original bill cannot be made parties to cross-bill. The City filed Suit No. 29,050, as shown on Pages 1-36 inclusive of Record, which petition sought to adjudicate all equities between the parties.

Bishopric, Harper and Shaffer came to the City and proposed to drill a gas well. Page 74 of Record. W. B. Shaffer was to have 11¼% interest, J. L. Harper 36% and Allison Bishopric was to have 52% interest (Pages 113 and 125, Record).

Shaffer had been in the oil and gas business in Arkansas, Kansas and Oklahoma since 1922. Page 121 of Record. Bishopric was experienced in oil and gas in several places, including Canada. Page 152 of Record. The agreement under which the joint venture is shown on Page 23 of the Record, in Suit No. 29,050. It is the same as Exhibit "A" to the City's cross-bill in Suit No. 28,901. Page 49 of Record. Under it Harper, Bishopric, and Shaffer proposed to the City that they would assist in the development of natural gas. The proposal stated:

> "We agree not to assign privilege (gas) without the consent of the City of Jackson, or upon the condition that gas available and produced be made available to the City." (Par. 6, Page 24, Transcript.)

Four wells were drilled, three of which were producers and one dry hole. Unknown to either party, the first well was drilled on the property of Mrs. Simpson, and was not embraced in the State's lease. Pages 132-133, Transcript. Mr. Bishopric was supposed to have put up one-half the money for the drilling of the wells, but he did not do so. Pages 78, 85, 86 and 107 of Record. Mr. Bishopric admitted owing on the fourth well the sum of $5,856.68 (Pages 157-158, Record). He wanted to use the credit of the City to this extent until he was reimbursed out of the sale of gas. (Pages 149-157-158 of Record.) This is in violation of Sec. 183 of the Mississippi Constitution. The first well was brought in in July, 1941 (Page 114 of Record), at which time an assignment was made by the City to Bishopric, Shaffer and Harper of a certain interest in approximately

240 acres of leases (Pages 27, 28, 29 of Record.) At the same time there was an assignment of an overriding 1/20th interest.

The City needed the gas for the people of Jackson. (Page 74 of Record.) After the gas came in, Harper, Shaffer and Bishopric were not interested in selling unless they could get the highest price (Page 118 of Record—130 and 131). Bishopric said he wanted to get every penny out of it he could (Record, 165).

The United Gas was paying 4½¢ per mcf. in the Jackson field, one well being within one-fourth mile of Fee No. 3 Well (Record, 109-182-183). The Miss. Power & Light Company had the franchise to sell gas in the City of Jackson. Exhibit "A", Pages 19-25, inclusive, Record. This franchise had a contract rate feature advantageous to the City as long as gas could be produced in sufficient quantities to meet the demands of the City of Jackson and its industries in the Jackson Area (Sec. 2, Franchise, Record, 21). And that is the reason the City was interested in getting gas (Record, 74).

The City had no authority to enter into such an agreement unless it be under Chapter 280, Laws of 1940, or Sec. 3396, Code of 1942. On August 28, 1941, Bishopric, and Shaffer were advised that the City would not sell gas to outside parties unless there was more than sufficient to meet the needs of local demands. Their reason for drilling was to stabilize gas rates, and that it would be necessary to sell to the Mississippi Power & Light Company (Pages 87-88, Record). The answer to this letter, dated Aug. 30, 1941, states that it is purely a business proposition in which Shaffer, Harper and Bishopric want to dispose of the gas to the best advantage (Record, 140-141). On Sept. 24th, 1941, Bishopric advised the City not to do anything without his approval. On November 12th, 1941, Bishopric warned the

City not to hook up the gas wells, after waiting for some agreement from July to November. The three gas wells were hooked up, and the proceeds sold to the Mississippi Power & Light Company (Record, 30-32, inc.). The gas from the wells to be used in the Jackson distribution system and not to go into the gathering system, which transported gas to towns other than Jackson. Sec. 2 of Agreement, Record, 31. The City, in December, 1941, discovered that Fee No. 3 well was located on the Simpson property and not on their lease. The City had already assigned one-half the lease and 1/20th override on the SW¼ of Section 25, Township 6 North, Range 1 East, First District of Hinds County, Miss., but asked contribution from Shaffer, et al., for acquiring the outstanding interest in the lease whereon Fee No. 3 well was located. Record, 132-133. Shaffer claimed one-half fee No. 3, or, 240/480ths, though the City could acquire only 320/480ths, and Bishopric did not want to participate in the Cost. Record, 177-178.

The Power & Light Company filed an answer admitting the allegations of the City in Suit No. 29,050. There was no decree prayed for against the Power & Light Company by Harper or Bishopric in Cause No. 28,901, nor by the City in No. 29,050. Bishopric, Shaffer and Mark Twain Oil Company did not file an answer, but the decree of the Court in the Consolidation (Record, 73) provided that the answer and cross-bill in Cause No. 28,901 would be considered and treated as their answer and cross-bill in Cause No. 29,050, and the answer of the City of Jackson to their cross-bill is shown on Pages 64 to 73, inclusive, of the Record.

The Lower Court held that the contract was ultra vires, void and beyond the power of the City to make, and refused to order specific performance of the contract as prayed for by petitioners in Cause No. 28,901, and denied them other

reliefs prayed for (R. 56) and taxed them with the cost (R. 194). The same contentions of petitioners were refused in Cause No. 29,050, and on account of the contract being ultra vires, void and beyond the power of the City to make, all matters dealing therewith were held to be ultra vires and void, insofar as they affected Bishopric, Shaffer, and Mark Twain Oil Co., and the same were cancelled (R. 191). The Supreme Court of the State of Mississippi in the two decisions arrived at the same conclusion.

The proof showed that the City of Jackson did not own or operate a gas distribution system (P. 101).

Response to the Summary Statements Involved in the Petition.

The Chancery Court and the Supreme Court of the State of Mississippi held that the City of Jackson did not have authority under Chapter 280, Miss. Laws of 1940, to make the contract with the petitioners, and that its acts were ultra vires. This law only applied to municipalities " 'that operate a gas system or a gas distribution system' are authorized to drill or purchase a well or wells to supply *said* gas system * * *" etc. The City of Jackson, in its effort to maintain their franchise with the Mississippi Power & Light Company (Exhibit "A", P. 19-23 inc., R.) was interested in getting gas sufficient to supply the demands of the City of Jackson and its inhabitants and its industries, so that it could maintain the advantageous rates that it had by a contact franchise (P. 84). (Section 2, Pages 20-21, Record.)

Petitioners, in propositioning the City in April 1941, stated:

> "In order to further the City in its development of natural gas, we make this proposition * * * (P. 23, R.) We agree not to assign this privilege without

> the consent of the City or upon the condition that gas available and produced be made available to the City." (Sec. 6, P. 24, R.)

After the wells came in, petitioners were not interested in selling unless they could get the highest price (P. 118-130-131-165, R.).

The market price paid by the United Gas was 4½¢ (P. 109-182-183, R.). The amount paid to the City for gas was average $0.9.113 per mcf. Petitioners wanted 30¢ per mcf. (P. 56, R.)

Shaffer, Bishopric, et al., never completed the contract but illegally and unlawfully used the credit of the City to the tune of one-half interest in the last well, the amount of money being $5,856.68 (R. 52, 157, 158).

Petitioners wanted the City to pay itself out of gas if, as and when sold. Petitioners were unwilling to accept 9.113¢ per mcf. Petitioner Shaffer wanted 16¢ (R. 122); petitioner Bishopric wanted 20¢ (R. 155), while they asked 30¢ in their bill (R. 54-56). The sale price to resident consumers in Jackson is 30¢ per mcf. for Jackson gas. (Pages 19-23 inclusive.) The Supreme Court first held the act of the City was ultra vires and void because Chapter 280, Miss. Laws of 1940, violated Sections 87 and 88 of the Constitution. On Suggestion of Error the Supreme Court withdrew this opinion on account of *Feemster* v. *Tupelo*, 83 Miss. 804. The new opinion of the Court held that the acts of the City were ultra vires, void, and beyond the power of the City. Justice Anderson, in re-writing his opinion, holding that the act was a violation of Chapter 183, of the Constitution of the State of Mississippi of 1890, and was therefore ultra vires. Justices Roberds and Alexander holding that the acts of the City were ultra vires and void, and the three justices approving the measure of recovery allowed by the lower court to the petitioners;

which was the full amount of money advanced, full compensation for any geographic or geophysic services rendered, plus accrued interest. Judges Griffith and McGee held that this contract was ultra vires and void, but that the measure of recovery by the petitioners should be different. One Justice holding that the Act, Chapter 280, was constitutional, and that it was within the power of the City to make the contract.

The Federal Constitution does not guarantee that decision of State courts shall be free from error or require that pronouncements shall be consistent. *Western County Trust Co.* v. *Riley*, 58 S. Ct. 185, 302 U. S. 292, 82 L. Ed. 268.

Petitioners state that it was without dispute the municipality did not lend any credit to petitioners but on the contrary petitioners paid their money, which was used in the venture. Petitioners used the City's credit on all ventures, paying thirty days thereafter, and refused to pay for their part of the dry hole venture (P. 157-158, R.). Petitioners now state that they have been deprived of their property, without due process of law under Art. 14, Section 1, of the Amendments to the Constitution of the United States, and base the jurisdiction of this Court under 28 U. S. C. A., Section 344-B.

The immediate complaint seems to be that petitioners only had a right to one Suggestion of Error in the Supreme Court of Mississippi.

The Chancery Court of Hinds County and the Mississippi Supreme Court based their decision on the fact that the acts of the City of Jackson in letting the contract and making the assignment was ultra vires, void and beyond the power of the City so to do. The constitutionality of the statute having no bearing on the question as to the Acts of the City, except that one of the judges stated that in his opinion the act was not unconstitutional, while another judge was of the opinion that this Section violated

Section 183, Mississippi Constitution. A majority of the court were of the opinion that the acts of the City were ultra vires. Petitioners state:

> "The Court will not be burdened with a re-statement of the facts but this court cannot find in this record one scintilla of evidence to support the majority of opinions of the State Court, that the credit of the municipality was lent the petitioners in violation of Section 183, Mississippi Constitution." (For our Answer see Pages 78, 85, 86, 107, 157, 158, Record.)

The Suggestion of Error filed by petitioners in the State Court being No. 3 Suggestion (P. 201-202, Record) takes the position that the opinion of the court impairs the obligation of a contract and takes complainants' property in violation of state and federal constitution. The Suggestion of Error in the State Court stated that under the *Feemster* case there was a rule of property and if the Court overruled it, it would be depriving petitioner of his property without due process of law (P. 202, R.).

The old doctrine that former decisions of the various courts constitutes a rule of property is fallacious and has been repudiated by the Supreme Court of the United States, by the State of Mississippi, and by a majority of the Courts of the land.

The Federal Courts must follow state statutes and decisions in all cases except as provided by the United States Constitution or Acts of Congress, thus overruling the federal general common law doctrine. *Erie R. Co.* v. *Tompkins*, 58 S. Ct. 817, 304 U. S. 62, 82 L. Ed. 1184.

> "The State Court rendered erroneous decision on question of State law, or overruled principles established by previous decisions on which party relied, does not confer appellant jurisdiction on Federal Supreme Court." Brikenhoff-Faris Trust & Savings Co. vs. Hill, 50 S. Ct. 451, 281 U. S. 673, 74 L. Ed. 1107.

"The meaning attributed by the highest court of a state to a statute of the state must be accepted by the U. S. Supreme Court on review as though it had been specifically expressed in the statute." See Supreme Lodge vs. Myer, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885, Appleby vs. City of New York, 46 S. Ct. 569, 271 U. S. 364, 70 L. Ed. 992.

"Whether or not a state court exceeded its function under the state constitution cannot give rise to questions respecting due process of law, which will sustain appellant jurisdiction of the Federal Supreme Court." Berk vs. Smith, 27 S. Ct. 37, 51 L. Ed. 121.

"United States Supreme Court is bound by decisions of the highest court of the state as to the powers of their municipalities." Railroad Commission of California vs. Los Angeles R. R. Commission, 50 S. Ct. 71, 280 U. S. 145, 74 L. Ed. 234.

The petitioners base their principal complaint on the fact that they did not have authority to file the second Suggestion of Error in the State Supreme Court.

"A decision of a state court resting on grounds of state procedure does not present a federal question." Gibson vs. Miss., 162 U. S. 565, 16 S. Ct. 904.

"Matters affecting the remedy are governed by the laws of the forum and a decision of the State Court on matters of state pleading or practice are not reviewable by the U. S. Supreme Court." Cent. Vermont R. R. Co. vs. White, 238 U. S. 507.

"The decision of the Supreme Court of the State on the Second Opinion that it will not re-open the questions involved in a federal defense presented by new pleas filed after the case was sent down for new trial merely settles a question of practice and does not present a federal question." Yazoo R. R. Co. vs. Miss., 180 U. S. 1, 20 S. Ct. 240, 45 L. Ed. 395.

Section 2391, Miss. Code of 1930, is the same as Section 3396, Miss. Code of 1942. Under this Section municipalities may sue and be sued, may purchase and hold real estate, may contract and be contracted with, but, unless

express statutory powers are given to the municipalities to deal in a particular way, there is no presumption in the State of Mississippi to be indulged in that the municipality has such powers.

The case of *Edwards House* v. *City of Jackson,* 132 Miss. 710, 96 So. 170, was a suit to enforce contract with the City such as petitioners have brought here. In that case the Edwards Hotel had contracted with the City for a tax exemption, which could be a legitimate exemption under the statute. They contracted to lease the City a street known as Esaw Street. The City had the right to purchase. The Court held that it was ultra vires and a void contract for the City to pay annually a sum of money equal to the tax on designated property for the lease of that property.

This same contract was then sued on in the case of *Edwards House* v. *City of Jackson,* 138 Miss. 644, 103 So. 428. The Court said in part:

> "The authority of a municipality is limited by the authority granted to it by the Legislature, and all persons who deal with a municipality are presumed to know the powers thereof, and the plaintiff in this case was aware of this rule of law. See Edwards Hotel & City St. R. Co. vs. City of Jackson, 96 Miss. 547, 51 So. 802. The Edwards Hotel Company also knew that the City of Jackson could not contract except in pursuance to the authority given to it by the Legislature. See Steitenroth vs. City of Jackson, 99 Miss. 354, 54 So. 955:
>
> " 'It is elementary law that municipalities have no powers, except such as are delegated to them by the state, either expressly or by necessary implication; and there is no distinction in this respect between governmental powers and those of a private or business nature. The powers of the municipality are granted to it, and must be exercised solely, for the benefit of the inhabitants thereof.' Steitenroth vs. City of Jackson, 99 Miss. 354, 54 So. 995.

"'The charter powers of a municipality are to be construed most strongly against a right claimed by it and not clearly given by the statute. When there is any doubt as to whether or not a municipality has the power to do or not to do a particular thing, this doubt should be solved against its charter powers, unless it is plainly manifest that the power is confided to the municipality to act.'"

"See Crittenden vs. Town of Booneville, 92 Miss. 277, 45 So. 723, 131 Am. St. Rep. 518. The sections of the void contract above quoted are, in our opinion, void because they undertook to have the city lease or rent property for street purposes, and there is no express or implied power in a municipality in Mississippi to thus establish a street. The only power conferred is to acquire a street in the statutory manner, and leasing a street for a stipulated price of $3,000 per annum, or for any other sum as to that particular stipulation, was of itself ultra vires and void."

The above case was upheld in the case of *Tullos* v. *McGee*, 181 Miss. 288, 179 So. 558, wherein the Court stated as follows:

"Appellant contends that by virtue of the authority of the statute conferring the power upon municipalities to install and maintain a waterworks system, there is given as an incident to such authority the right to employ some one to operate the plant and to fix his compensation therefor. This is true as regards contracts reasonably necessary and expedient for the accomplishment of that purpose. However, it is beyond the power of municipal officers to bind their successors in office to the exercise of their discretionary authority to fix the compensation of employees engaged for the performance of services rendered to the public. Such a contract, being ultra vires, does not estop the municipality, since all persons dealing with it are charged with knowledge of the laws by which it is governed, which limit the power of its officers. Only such powers are possessed by a municipality as are expressly conferred by statute, together with those granted by

necessary implication by what is expressed in terms, and such powers as are either express or implied are the powers of the municipalities, and not of the officers who represent them.

"It is necessary to hold under the authority of Edwards Hotel Co. vs. City of Jackson, 96 Miss. 547, 51 So. 802, and Edwards House Co. vs. City of Jackson, 138 Miss. 644, 103 So. 428, 42 A.L.R. 625, and the cases therein cited, that the contract in question is ultra vires, and there unenforceable, as attempting to fix the compensation of a city employee to cover a period of employment extending beyond any reasonable limitation. Therefore the judgment of the circuit court must be affirmed."

The three cases were consolidated in the lower Court (R. 73). The decision of the lower court embraced three cases (R. 194). The judgment of the Supreme Court affirmed the Chancery Court of Hinds County (P. 200, Record).

Decision on appeal from decrees consolidated suits held not reviewable on certiorari where petition of certiorari complained only of decision in other respects. *Johnson* v. *Manhatten,* 289 U. S. 479, 53 S. Ct. 721, 77 L. Ed. 133; and further, certiorari on petition of one party to a joint judgment must be denied by the Supreme Court of the United States where the record fails to disclose summons and severance. *Morganthau* v. *Stevens,* 55 S. Ct. 542, 294 U. S. 720, 79 L. Ed. 1252.

We respectfully submit that there is no federal question, and the petition for certiorari should be denied.

Very respectfully submitted,

W. E. Morse,
Atty. for the City of Jackson.